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No. 07-799

FEB 15 2008
CLERK

In The

Supreme Court of the United States

CAPTAIN D'S, LLC,

Petitioner,

v.

TAMMY SMITH, by and through her father and next friend, ALVIN CHRISTOPHER SMITH,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Mississippi

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF ISSUE

Where an agreement arbitration of all disputes that "arise out of or relate to" a worker's employment, and a State's highest court holds that the contract does not require arbitration of a worker's claim against her employer over her rape at the workplace, does the Federal Arbitration Act preempt that decision and require that her claims fall within the language of the contract as a matter of federal law?

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INTRODUCTION

Petitioner Captain D's, LLC (hereinafter "Capt.") (a Mississippi seafood restaurant) requires all of its employees to sign a document agreeing to submit to mandatory arbitration any claims that "relate to" or "arise from" their employment. Tammy Smith, an employee of Petitioner, was raped by a fellow employee, and brought a lawsuit against both Petitioner and the rapist. Petitioner sought to compel arbitration of Ms. Smith's claims, but the Mississippi Supreme Court – applying traditional state law contract interpretation principles – held that her claims did not "relate to" or "arise out of" her employment, and thus that the case did not fall within the scope of the arbitration agreement.

Displeased with this interpretation of its contract, Petitioner unleashes a scathing attack upon the integrity of the Mississippi Supreme Court. Supported by no evidence, Petitioner repeatedly accuses the Mississippi Supreme Court of "manipulating" the contract's language in order to establish a rule that civil cases involving sexual assault may never be arbitrated. *E.g.*, Pet. at i, 2, 11.

In order to protect against the supposed specter of future court decisions dishonestly "manipulating" contract language out of a secret desire to keep sexual assault cases out of arbitration, Petitioner asks this Court to exercise its certiorari jurisdiction. More specifically, Petitioner asks this Court to hold that the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), provides that whenever an employee has a dispute

with her employer involving a rape in the workplace, this dispute falls within the scope of an agreement to arbitrate disputes that "arise from or relate to" her employment as a matter of federal contract law. This narrow and idiosyncratic Petition does not begin to justify the exercise of this Court's jurisdiction.

First, there is no genuine conflict between the decision of the court below and any other court in the United States. Petitioner alleges the existence of a conflict, by mischaracterizing the decision below as supposedly being an unreasonable refusal to enforce an unambiguous arbitration clause, and then contrasting it with cases involving unrelated issues where courts did enforce arbitration clauses. Petitioner also argues that some lower courts are "confused" as to the relationship between state and federal law with respect to some types of challenges to arbitration clauses. In fact, however, the basic principles of law in this area are clear and well established – the interpretation of the language and scope of arbitration contracts (as with other contracts) is generally a matter governed by state law, unless that state law disfavors arbitration clauses relative to other contract provisions. There is no conflict on these principles.

Second, the decision below is entirely consistent with the decisions of this Court setting out these two principles. Petitioner's assertions of error depend upon the premise that the court below is hostile to arbitration and acted completely unreasonably. In fact, the Mississippi Supreme Court has regularly

and repeatedly enforced arbitration clauses in all sorts of cases, including tort cases, and *including another sexual assault case involving claims that were within the scope of the arbitration clause. See Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby*, ___ So.2d ___, 2008 WL 95814 (Miss. Jan. 10, 2008) (*compelling* arbitration in a case where a woman with the mental capacity of a three-year-old sought tort damages after being sexually assaulted in a nursing home). In addition, the decision of the court below is entirely defensible based upon the contract language at issue here. The court below effectively held that Ms. Smith's "employment" consisted of her work of a restaurant. Because she was neither hired nor paid to be raped, her claims against her employer did not "relate to" or "arise from" her employment. Petitioner could have easily used contract language that would have placed these claims within the scope of the clause (such as providing that disputes arising from events occurring on its premises must be arbitrated). It did not. Petitioner used language that few employees would have imagined would apply to a case such as this one. Thus, the decision below was a matter of contract interpretation, pure and simple, and utterly lacking in any indication of hostility to arbitration. For this reason, there is no basis for concluding that the decision below conflicts with any of this Court's decisions counseling against hostility to arbitration.

More broadly, Petitioner requests that this Court rule that any decision holding that some dispute falls

outside of the scope of an arbitration clause – something which is largely a question of state law under this Court's current decisions – should instead effectively become entirely a federal question. Petitioner's suggestion that the law of interpreting contract language in arbitration agreements be treated as a question of federal law sharply conflicts with this Court's jurisprudence of FAA preemption, as well as this Court's broader jurisprudence of conflict preemption generally.

Finally, at its end, the Petition tosses in a short assertion that Petitioner's due process rights were violated because the court below decided the case on an issue that was not briefed by either party, even though Petitioner's arguments on the point were subsequently heard by the court below on a petition for rehearing. This argument is entirely novel and unsupported by any authority other than references to vague statements about the right to be heard. Plainly, this alone is not sufficient ground for this Court to grant review.

STATEMENT OF THE CASE

A. The Underlying Case

Respondent Tammy Smith applied for a job at Capt. D's restaurant when she was 17 years old. It was the first job of her life. When she applied for the job, Ms. Smith was asked to sign a short document ("Employment Dispute Resolution Plan Sheet")

referencing Capt. D's arbitration plan, but was not actually given a copy of the 32-page plan. It was made clear to Ms. Smith that she could not get the job unless she signed the Employment Dispute Resolution Plan Sheet. Later, Ms. Smith was given an earlier version of Capt. D's arbitration plan, but not the one that was in effect at the time that her employment began. Because she was not yet an adult, the restaurant's management insisted that her grandmother (who was not her legal guardian; she lived with her father) also sign the application. According to the undisputed testimony, neither Ms. Smith nor her grandmother understood the concept of arbitration; her grandmother thought that it referred to some special legal requirement that must be fulfilled for a minor to work at restaurants.

Within a few weeks of beginning her employment, Ms. Smith (still 17 years old) was forcefully raped by the restaurant's manager, who was a convicted sex offender.

About seven months later, Ms. Smith filed a complaint alleging several torts under Mississippi law against both Petitioner and the rapist. Petitioner moved for the trial court to compel arbitration of her claims. At the same time that it demanded arbitration, Petitioner also asked the trial court to resolve an arbitrable issue, moving for the court to dismiss most of Ms. Smith's claims on the grounds that they were supposedly barred by the Workers' Compensation Act. The trial court granted Petitioner's motion to compel arbitration, and dismissed Ms. Smith's claims. The

trial court's decision was affirmed by a panel of the Mississippi Court of Appeals, whose decision in turn was appealed to the Mississippi Supreme Court.

B. The Mississippi Supreme Court's Decision

Reversing the lower courts, the Mississippi Supreme Court began by setting forth the premise that there is a strong and liberal federal policy favoring the enforcement of arbitration agreements. Pet. App. A at 7a. Nonetheless, the court cited with approval a Second Circuit decision establishing the noncontroversial position that arbitration agreements "must not be so broadly construed as to encompass claims and parties that were not intended by the original contract." *Id.*, quoting *Thomson-CSF, S.A. v. American Arbitration Association*, 664 F.3d 773, 776 (2d Cir. 1995). After reviewing Mississippi precedent addressing similar issues, the court held that "we unquestionably find that a claim of sexual assault neither pertains to nor has a connection with Tammy's employment." Pet. App. A at 11a.

Petitioner then filed the instant petition.

REASONS FOR DENYING THE PETITION

I. There Is No Split in Authority on the Questions Presented in the Petition.

To establish a conflict on an issue of federal law between the decision below and any other state high

court or federal appellate court, Petitioner must identify *some* court holding that the FAA requires that claims arising from a rape at a workplace are within the scope of an agreement requiring arbitration of claims that "arise out of" or are "related to" the employment of the victim. Petitioner fails to do so. Instead, the Petition attempts to manufacture a conflict by mischaracterizing the decision below as a flat refusal to enforce an arbitration clause in the face of the only possible reading of its language, Pet. at 22, and then asserts that this straw man caricature conflicts with a host of courts that have enforced arbitration clauses. Pet. at 22-23. By beginning with the incorrect assumption that the opinion below is a dishonest refusal to obey federal law (an assumption thoroughly disproven in Part II-A below), Petitioner conjures up an imaginary conflict with a host of courts applying different contract language to completely different types of cases and totally unrelated causes of action, and addressing unrelated issues. Indeed, many of the cases cited in the Petition, at 22-23, do not even involve arguments that the disputes in those cases were outside the scope of the arbitration clauses at issue.

The only even arguably relevant case that Petitioner identifies is *Ryan's Family Steak Houses, Inc. v. Regelin*, 735 So.2d 454 (Ala. 1999). Pet. at 23-24. It is true that in *Regelin*, the court enforced an arbitration clause in a case involving claims of assault. But the very brief legal discussion in the short decision does not mention any question about the scope of the

arbitration clause. Indeed, the entirety of the legal discussion in the *Regelin* case consists of a few sentences pointing out that the plaintiffs there had introduced no evidence that they had not signed the arbitration clause or had been defrauded into it. There is no conflict between the reasoning or language of the decision in *Regelin* and this case; there is only the fact that the cases reached different results. The differing conclusions as to state law set forth by these two courts hardly justify the exercise of this Court's jurisdiction. *See* Michael S. Schenberg, *Identification, Tolerability, and Resolution of Intercircuit Conflicts*, 59 N.Y.U. L. Rev. 1007, 1013-14 (1984) ("when two courts apply the same legal rule to similar facts and reach different conclusions, the presumption is that there is no conflict.").

Having failed to allege a genuine conflict between this case and any other decision from a state high court or federal appellate court, the Petition urges that this Court grant review to clarify the law. The Petition notes that a panel of the Fifth Circuit has confessed to confusion about the law in the general area of "the dance" between federal and state law in the enforcement of arbitration clauses that "cries out to be settled." Petition at 12-13 (citing *Washington Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260 (5th Cir. 2004)). In so arguing, Petitioner cites to a statement in the *Bailey* case that, in deciding challenges to arbitration clauses, it "is often an uncertain question" as to when a court should apply state law or when a court should apply federal law.

Bailey, however, is wholly inapposite. This case involves a dispute as to whether certain claims fell outside the scope of an arbitration clause. *Bailey* did not involve a challenge to the scope of an arbitration clause. Instead, it involved challenges to the enforceability of an arbitration clause based upon the alleged inability of the plaintiff to read or understand the clause, and the alleged unconscionability of the clause. Thus, even if it were true that many courts in the U.S. are confused about the relationship between federal and state law relating to the subjects at issue in *Bailey*, that confusion would not be alleviated by this Court granting *this* Petition and deciding the issue posed in *this* case.

In any event, there is no such "confusion" regarding the basic legal principles that govern whether a particular claim falls within the scope of a particular arbitration clause. In essence, there are two principles applicable here, neither of which is controversial as a matter of law. First, notwithstanding Petitioner's heavy emphasis on the supposedly dominant role of federal law, *e.g.*, Pet. at 14-15, this Court has directed that the interpretation of the language of arbitration clauses is generally a matter for state law. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) ("when deciding whether the parties agreed to arbitrate a certain matter . . . courts generally should apply ordinary state-law principles that govern the formation of contracts"); *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) ("the interpretation of private

contracts is ordinarily a question of state law, which this Court does not sit to review"); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003) (the contractual interpretation question of whether an arbitration clause permitted class actions in arbitration was "a matter of state law. . . .").[1]

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[1] This Court has repeatedly recognized the significant role reserved for state law under the FAA in a variety of other contexts in addition to scope determinations. For example, this Court has noted that the rules of state contract law provide the primary source of protection for consumers against corporate over-reaching in cases governed by the FAA. *See, e.g., Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'"). There are innumerable cases in which courts have applied generally applicable state contract law to arbitration clauses, even when the application of those laws barred the enforcement of a given arbitration clause with respect to a given case. For example, the generally applicable rule of contract law that ambiguities in contracts will be interpreted against the drafter is routinely applied to arbitration clauses, even where it results in not requiring a party to arbitrate her or his claims. *See, e.g., Victoria v. Superior Court*, 222 Cal. Rptr. 1 (1985), *reh'g denied* (1986); *Dumais v. American Golf Corp.*, 299 F.3d 1216, 1219-20 (10th Cir. 2002); *Quigley v. KPMG Peat Marwick, LLP*, 749 A.2d 405, 416 (N.J. Super. Ct. App. Div. 2000). Similarly, the generally applicable rule of contract law that specific contract provisions will govern over general provisions applies to disputes over the construction of arbitration clauses, even when it has the effect that a party will not be required to arbitrate her or his claims. *See, e.g., Transit Casualty Co. in Receivership v. Certain*

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The second legal principle applicable to this dispute is as uncontroversial as the first one. This Court has recognized an exception to the rule that arbitration clauses are governed by state contract law for those instances where state contract laws target arbitration clauses for treatment that is inferior to other types of contracts. *See, e.g., Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (noting that the FAA preempts a state statute that imposed specific disclosure requirements applicable only to arbitration agreements and explaining that, through the FAA, Congress precluded states from singling out arbitration provisions for suspect treatment); *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal footing, directly contrary to the Act's language and Congress' intent.") This exception does not apply here, because, as set forth in Part II-A and II-B below, the Mississippi Supreme Court's ruling in this case is not based in any hostility to arbitration, does not single out the arbitration clause for uniquely unfavorable treatment, and is a perfectly reasonable reading of the contract language at issue.

In sum, the principles governing whether a given cause of action is outside of the scope of an arbitration clause are well established and noncontroversial.

Underwriters at Lloyd's of London, 963 S.W.2d 392, 399 (Mo. Ct. App. 1998).

It is beyond peradventure that state law governs the interpretation of contractual language, so long as the state law does not disfavor arbitration clauses relative to other types of contract terms. Petitioner has not shown, and cannot show, a conflict or a "state of confusion" about either these broad principles or their application to this case. Thus, there is no split of authority or disarray among the lower courts that would warrant this Court's exercise of its *certiorari* jurisdiction in this case.

II. The Decision Below Is Entirely Consistent With This Court's Jurisprudence.

A. Mississippi Law Is Not Hostile to Arbitration.

Nor is there any basis to Petitioner's claim that review is warranted because the decision below conflicts with Court's decisions prohibiting unwarranted "hostility" to arbitration. As explained above, Petitioner's theory depends upon the conclusion that the Mississippi Supreme Court's decision reflects some general hostility to arbitration and, more specifically, a desire to "create a rule of law" that tort claims – and even more specifically, sexual assault claims – are never suitable for arbitration. *E.g.*, Pet. at 9, 11, 17, 20. If Petitioner does not convincingly establish this premise, then there is no conflict on any federal issue of law and the entire logic of the Petition collapses.

In fact, the Mississippi Supreme Court is entirely innocent of any hostility to arbitration. Notwithstanding the harsh conclusions that Petitioner draws from the fact that it lost this one particular case, the broader record evident from a large number of decisions demonstrates that the Mississippi Supreme Court has vigorously enforced the FAA, and has repeatedly and regularly compelled arbitration. Just this year, for example, that Court enforced an arbitration clause in a sexual assault case. *See, e.g., Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby*, ___ So.2d ___, 2008 WL 95814 (Miss. Jan. 10, 2008) (compelling arbitration of claims of a nursing home resident with the mental capacity of a three-year-old who claimed that she was negligently treated, abused, and *sexually assaulted* while a resident at the nursing home). *Magnolia Healthcare* conclusively rebuts Petitioner's claim that the Mississippi Supreme Court has erected some blanket rule barring arbitration of civil litigation arising out of sexual assaults. *Magnolia Healthcare* demonstrates that the Mississippi Supreme Court's decision below is what it says it is – an interpretation of particular contract language – rather than a subterfuge.

Similarly, a number of other Mississippi Supreme Court decisions demonstrate that it has erected no rule against compelling arbitration in tort cases, notwithstanding the claims of bias and "manipulation" throughout the Petition. *E.g., Cleveland v. Mann*, 942 So.2d 108 (Miss. 2006) (compelling arbitration in wrongful death case brought against a

surgeon after patient's bowel was punctured during a hernia operation); *Doleac v. Real Estate Professionals, LLC*, 911 So.2d 496, 504 (Miss. 2005) (enforcing an arbitration clause in a real estate lease dispute, and holding that "tort claims . . . are subject to the arbitration clause"). This is obviously not a court that is reluctant to send tort claims – including tort claims involving grievous personal injuries – to arbitration.

The great willingness of the Mississippi Supreme Court to compel arbitration of all manner of disputes is further evident from a host of cases not involving tort claims decided in just the past few years. *See, e.g., Century 21 Maselle and Associates, Inc. v. Smith*, 965 So.2d 1031 (Miss. 2007) (compelling arbitration against real estate purchasers claiming negligence and fraud); *Fradella v. Seabury*, 952 So.2d 165 (Miss. 2007) (compelling arbitration against real estate purchasers, even though the real estate agent was not a signatory to a purchase agreement); *Greater Canton Ford Mercury, Inc. v. Ables*, 948 So.2d 417 (Miss. 2007) (compelling arbitration in case involving used car sale); *Equifirst Corp. v. Jackson*, 920 So.2d 458 (Miss. 2006) (compelling arbitration in mortgage case, denying unconscionability challenge); *Sullivan v. Protex Weatherproofing, Inc.*, 913 So.2d 256 (Miss. 2005) (enforcing arbitration clause in employment case).

Even if the Mississippi Supreme Court had not already established this extensive pro-arbitration jurisprudence, this Court should not entertain Petitioner's repeated suggestions that the proper starting

point for this Court's analysis is to begin with a deep suspicion of the motives and integrity of the court below. While Petitioner is quick to levy allegations that the decision below was rooted in the results-oriented manipulation of contract language for the purpose of denying arbitration in cases involving the rape of young employees, this opening premise of suspicion is wholly inappropriate. Instead, this Court should begin with a strong presumption that the duly elected high court of a sovereign state is acting with integrity and honesty in its work. *See, e.g., Ballard v. C.I.R.*, 544 U.S. 40 (2005) ("This Court generally does not assume abdication or impropriety, . . . and should not impugn the integrity of judges based on an un-substantiated, non-specific affidavit.")[2] This Court should not exercise its jurisdiction out of a losing litigant's generalized suspicion that a state high court is "manipulating" language to achieve improper results.

B. The Lower Court's Interpretation of the Contract Language At Issue In This Case Was Reasonable.

Petitioner's claim that the alleged "hostility" of the Mississippi Supreme Court to arbitration warrants

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[2] *Cf. K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) ("without firmer evidence tending to impugn a legislator's integrity, the presumption that legislators mean what they say would seem more appropriate than the opposite presumption that the Court of Appeals applied.")

review is further undermined by the evident reasonableness of the lower court's interpretation of the contract. The Petition repeatedly simply assumes that it is self-evident that the only plausible reading of the language of Petitioner's arbitration clause would include Ms. Smith's claims. In reality, this assumption has no basis, and the decision below is an entirely reasonable reading of the agreement's language.

First, few (if any) employees would expect that a forcible rape was something that would "arise out of" their employment. In looking forward to the first job of her life, Ms. Smith would reasonably expect that the work of a restaurant – cleaning and maintaining the premises, serving customers, preparing food – would arise out of her employment. She might also expect that issues relating to the conditions and compensation for her work would "arise out of" her employment. It is beyond a stretch to read this phrase to include a rape.

Similarly, it is hard to imagine that any employees would believe that a forcible rape "relates to" employment in a restaurant. Petitioner assumes that this phrase must be read as broadly as possible, but in other contexts, this Court has noted that interpretations of the phrase "relate to" must be tempered by normal expectations. For example, in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), this Court held that surcharges on the bills of a health plan did not "relate to" the plan. This Court noted that it

would be possible to read the phrase "relate to" broadly enough to find that the surcharges related to the plan, but rejected such "uncritical literalism":

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere," H. James, Roderick Hudson xli (New York ed., World's Classics 1980).

Id., 514 U.S. at 655.[3]

In short, it is Petitioner's interpretation of the arbitration clause at issue that sweeps too broadly. Characterizing the decision below as evidencing a "hostility" to arbitration is simply in error. The fact is that Petitioner failed to draft an arbitration clause as broadly as it now wishes that it had done. Rather than see this as an error in draftsmanship that it could fix, Petitioner places all the blame on the

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[3] Petitioner could easily have drafted its arbitration clause more broadly if it intended to require its employees to arbitrate claims arising out of forcible rapes at the work place. A number of arbitration clauses that are in widespread use in the United States provide that any claims arising from events or incidents that take place on specified premises must be arbitrated. *E.g.*, *Derlantis v. Heritage Convalescent Hosp., Inc.*, 2005 WL 1275143 (Cal. Ct. App. 2005) (nursing home arbitration clause covers claims arising from events on the premises); *Pepsi-Cola Albany Bottling Co. v. Int'l Broth. of Teamsters, Local 669*, 1998 WL 315092 (N.D.N.Y. June 10, 1998) (arbitration clause covered illegal actions such as selling drugs "on Company premises at any time").

supposed hostility of the Mississippi Supreme Court to permitting any civil claim involving sexual assault to ever be arbitrated. But this alleged hostility does not exist. Accordingly, the only reasonable explanation for the decision below is not a desire to undermine the Federal Arbitration Act, but instead a natural and reasonable reading of the specific language of Petitioner's arbitration clause.

C. Petitioner's Suggestion That This Court Should Federalize Disputes Over the Scope of Arbitration Clauses Does Not Justify the Exercise of This Court's Jurisdiction.

Although the Petition does not say so directly, it is essentially a call for this Court to significantly expand the scope of preemption under the FAA far beyond the bounds previously spelled out by this Court. This radical and unsupported argument does not justify this Court's intervention in this narrow dispute.

There is no dispute that, if Mississippi law governs the question of whether the claims at issue in this case fall within the language of the particular arbitration agreement in this case, the claims are not arbitrable and Ms. Smith prevails. Petitioner does not cite to any Mississippi case holding that a rape is something that "arises out of employment." Indeed, Petitioner acknowledges (and complains) that state law is against it. Instead, Petitioner asks this Court

to grant the Petition and rule that federal law overrides and preempts Mississippi law on this point. *E.g.*, Pet. at 24. Petitioner repeatedly argues for a broader role for federal law in the adjudication of disputes relating to arbitration.

Petitioner couches its Petition as a request for this Court to enforce the limitations it has already placed upon state law with respect to arbitration clauses, but that posture is misleading. In fact, Petitioner's claim for a broadly expanded preemption inquiry in disputes over the scope of arbitration clauses must be analyzed in light of the strong presumption against federal preemption of state contract law. This Court has directed repeatedly that, "[i]n areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" *Bates v. Dow Agrosciences*, 544 U.S. 431, 449 (2005) (internal citations omitted). The presumption against preemption applies both to the existence of preemption and the scope of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996). The presumption helps ensure that the balance between federal and state power will not be disturbed unintentionally by Congress or unnecessarily by the courts. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

In light of this heavy presumption, this Court has held that federal law may preempt state law in only three circumstances: (a) when Congress has expressly provided for preemption; (b) when Congress intends

for federal law to occupy a field; or (c) where state law conflicts with a federal statute. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 371 (2000). As this Court has recognized, however, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989). Therefore, the FAA can displace state law only through the doctrine of implied conflict preemption. *Id.* at 477-78.

In order to establish that the FAA impliedly preempts Mississippi law holding that the phrase "arising out of or relating to . . . employment" does not include rapes in the workplace, Petitioner must demonstrate that there is an "actual conflict" between federal and state law, either because it is "impossible for a private party to comply with both . . . requirements" or because the state laws "stand[ ] as an obstacle to the accomplishment and execution of the full purposes" of Congress. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (citations omitted). For this Court to find such a conflict, it would have to find that there is a federal contract law answer to the contract interpretation question posed here. Petitioner, however, points to no rule of federal law on this subject. Instead, it depends upon its repeated assumption that the decision of the Court below was self-evidently wrong and can only be explained by supposed hostility towards arbitration.

This is not surprising, because no federal law – contract or otherwise – addresses the subject at issue in this case. In cases such as this, this Court has refused to find preemption. *See, e.g., Freightliner*, 514 U.S. at 289-90 (unanimous holding that common-law claims involving a manufacturer's failure to install antilock brakes in trucks are not preempted by the Motor Vehicle Safety Act because "[t]here is no express federal standard addressing [antilock brakes] for trucks or trailers.").

This Court should reject Petitioner's request that this Court use this case as a vehicle to delve into (and re-write) normal state law principles governing contract interpretation. This Court should refuse the invitation to federalize the interpretation of all arbitration agreements, as contract law is an area traditionally governed by state law. While there is a body of federal common law governing contracts in a few narrow areas (such as in collective bargaining disputes governed by the federal labor laws or in certain maritime settings), few areas of law have been more deeply entrusted to the states than the law of contract formation. *See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 84 (1982) ("the cases before us, which center upon appellant Northern's claim for damages for breach of contract . . . , involve a right created by *state* law. . . ."), 458 U.S. at 90 (emphasis added, Rehnquist, J., and O'Connor, J., concurring) ("the lawsuit . . . seeks damages for breach of contract . . . which are the stuff of traditional actions at common law. . . . There is

apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims . . . arise entirely under state law."); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) ("[C]ommercial agreements traditionally are the domain of state law. State law is not displaced merely because the contract relates to intellectual property which may or may not be patentable"); *Pan Am. Petroleum Corp. v. Superior Court*, 366 U.S. 656, 663 (1961) (contract dispute) ("The suits are thus based upon claims of right arising under state, not federal law. . . . The rights as asserted by Cities Service are traditional common law claims."); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 40 (1988) (Scalia, J., dissenting) ("Nor can or should courts ignore that issues of contract validity are traditionally matters governed by state law.").

In sum, Petitioner has not demonstrated that there is any conflict between the decision below and either any decision by another state high court or federal court of appeal, or any conflict between the decision below and any decision of this Court, and Petitioner has not justified why this Court should create any new body of federal contract law that would change the result in this case.

III. Petitioner's Constitutional Argument Is Unworthy of a Grant of *Certiorari*.

Nor is the due process argument raised by Petitioner worthy of review by this Court. Petitioner

makes a great deal of the fact that the question of the scope of the arbitration clause was not addressed in the briefs of the parties prior to the Mississippi Supreme Court's decision. *E.g.*, Pet. at 7-10, 17-18, 20-21. Petitioner argues that this fact proves that the decision below was motivated by a hostility towards arbitration, a contention disproven in Part II-A above. In addition, in the last few pages of the Petition, Petitioner goes so far as to allege that it violates the United States Constitution for an appellate court to decide a case based upon an issue not briefed before it. Pet. at 25-26. Petitioner's novel constitutional argument asks this Court to create an entirely new constitutional right that would ban a fairly common practice in state and federal appellate courts, and limit the discretion of those courts to decide cases as they think best.

Petitioner's constitutional argument does not justify this Court's review, in part because it would inject this Court into a very commonplace appellate practice. Notwithstanding Petitioner's multiple protestations of shock that the court below considered an issue not presented in the briefs, it must be recognized that as a matter of empirical reality it is far from uncommon for courts throughout the United States to decide issues that have not been briefed on appeal. Appellate courts have an obligation to issue decisions setting forth the correct legal answers in cases, and not merely selecting between possible answers that were thought of by the litigants before them. For just a few of the many illustrations that

could be given of courts deciding cases based upon issues not included in the briefs, *see, e.g., U.S. v. Escamilla-Vasquez*, 201 Fed. Appx. 181 (4th Cir. 2006) (choosing to hear arguments not raised in a party's brief); *Sash v. Zenk*, 439 F.3d 61 (2d Cir. 2006) ("We write to address an issue not raised in the briefs or oral argument in this case"); *Armstrong ex rel. Armstrong v. Brookdale University Hospital*, 425 F.3d 126 (2d Cir. 2005) ("The failure of plaintiffs to raise this argument in their briefs does not preclude us from reaching it because it presents a pure issue of law, *Lambert v. Genesee Hosp.*, 10 F.3d 46, 56 (2d Cir. 1993) (resolving a dispositive issue sua sponte because, in part, it was not necessary to resolve any issues of fact)"); *Consumers Union of U.S., Inc. v. Fed. Power Comm'n*, 510 F.2d 656, 662 (D.C. Cir. 1975) ("[R]egarding the contents of briefs on appeal, we may also consider points not raised in the briefs or in oral argument. Our willingness to do so rests on a balancing of considerations of judicial orderliness and efficiency against the need for the greatest possible accuracy in judicial decisionmaking. The latter factor is of particular weight when the decision affects the broad public interest.") (footnotes omitted); *Wells v. Chevy Chase Bank, F.S.B.*, 768 A.2d 620, 630 (Md. 2000) (deciding case on an issue that "[w]e recognize neither party has argued. . . .").

This Court should not grant the Petition, because under Petitioner's novel theory, all of these court decisions – and scores more like them – would be constitutionally suspect. Not only is it fairly common

for appellate courts to address decisive issues that parties failed to notice or brief, but there are some issues (such as subject matter jurisdiction) that appellate courts are required to raise and address even if the parties failed entirely to address them. *E.g.*, *Olivera-Garcia v. INS*, 328 F.3d 1083, 1086 (9th Cir. 2003) ("subject matter jurisdiction may not be waived"). The Petition does not acknowledge the radical nature of the position it asks this Court to embrace.

Petitioner's constitutional argument also does not justify this Court's review, as it lacks serious support in the case law. For Petitioner to prevail upon this ground, this Court would have to break completely new ground. None of the authorities that Petitioner cites in support of its constitutional argument involves court decisions addressing issues not briefed to those courts, or any factual scenario that even remotely approaches such a situation. Instead, Petitioner relies upon general platitudes about the nature of due process from cases that involve completely unrelated issues. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1970), Pet. at 26, addressed whether known beneficiaries of a trust had to be given notice and an opportunity to make claims to the trust. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), Pet. at 26, dealt with the notice to be given to absent class members in a class action. Neither these nor any of the other cases cited by Petitioner relate to or support the constitutional claim it advances here.

Finally, Petitioner's constitutional argument does not justify this Court's review, because Petitioner *did* receive an opportunity to have its arguments heard relating to the scope of its arbitration clause. Petitioner moved for rehearing, and filed briefs, on the issue of the scope of its arbitration clause. After reading those briefs, the Mississippi Supreme Court rejected Petitioner's argument. Petitioner nonetheless argues that its due process rights were violated even though it presented all of its arguments to the court, and had those arguments heard, citing *Armstrong v. Manzo*, 380 U.S. 545 (1965). *Armstrong* is not remotely applicable to this context. There, the biological father of a child was not notified when the child was put up for adoption. Only after the adoption decree was issued did the biological father learn of the adoption and contest it. This Court held that in that context, an after-the-fact notice did not protect the father's due process rights because *the burden of proof* that he faced changed as a matter of law due to the entry of the adoption decree. 380 U.S. at 551. In this case, by sharp contrast, nothing happened to Petitioner as a consequence of the delay between the original decision of the Mississippi Supreme Court and its later reconsideration based upon Petitioner's demand for rehearing. No trial was held, no burden of proof was shifted, Petitioner was not prejudiced or harmed in any way. In short, Petitioner's constitutional argument is without any merit.

CONCLUSION

For all the reasons set forth above, this Court should deny the Petition for certiorari.

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